Supreme Court, U.S.
FILED

031057 JAN 16 2004

No. _____

In the Supreme Court of the United States

CARL A. DENGEL,
Petitioner,

v.

R. MICHAEL BOLEN,
UNITED STATES TRUSTEE,
REGION 5, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Kevin O'Bryon
O'Bryon & Schnabel, PLC
1515 Poydras Street
Suite 830
New Orleans, LA 70112
(504) 799-4200
(504) 799-4211 fax

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

28 USC 586 embodies a statutory scheme authorizing the appointment of Standing Trustees in Chapter 12 bankruptcy cases. The statute fixes limitations on Standing Trustee compensation and delegates two specific compensation-related functions to the Attorney General. The Executive Office of U.S. Trustees has created a Handbook purporting to impose limitations on Standing Trustee compensation in addition to those provided for by the statute. The Circuit Court of Appeal ruled that the EOUST may institute any policy not unambiguously prohibited by the statute.

1. What level of judicial deference to an Agency construction of a statute it administers is appropriate, where the construction is set forth in an Agency manual and the statute does not delegate any authority to the Agency on the point at issue?

PARTIES TO THE PROCEEDINGS

Petitioner

The petitioner in this case is Carl A. Dengel, former Chapter 12 Standing Trustee for the U.S. Bankruptcy Court for the Eastern District of Louisiana.

Respondents

Other parties to the proceeding in the court whose judgment is sought to be reviewed are:

R. Michael Bolen, United States Trustee, Region 5

Bank One, National Association, Successor by Name Change to Bank One, Louisiana, National Association and Successor by Merger and Name Change to First National Bank of Commerce

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Defendant-Plaintiff in Counterclaim-Third Party Plaintiff-Appellant Carl A. Dengel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

DECISIONS BELOW

The opinion of the Circuit Court of Appeals is reproduced in Appendix B, and reported at 340 F.3d 300. The decision and orders of the District Court are unpublished, and are reproduced at Appendix C-1 and C-2. The Bankruptcy Judge's Proposed Findings of Fact and Conclusions of Law are reproduced at Appendix D.

The Circuit Court of Appeals order denying the petition for panel rehearing is noted in the reported decision and is reproduced in Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 11, 2003, and revised on October 1, 2003. Dengel's timely petition for panel rehearing was denied on October 22, 2003. This Court has jurisdiction under 28 USC 1254(1) to review the Circuit Court's decision on writ of certiorari.

STATUTORY PROVISION INVOLVED

28 USC 586(e):

(e) (1) The Attorney General, after consultation with a United States trustee that has appointed an individual under subsection (b) of this section to serve as standing

trustee in cases under chapter 12 or 13 of title 11, shall fix–

(A) a maximum annual compensation for such individual consisting of–

(i) an amount not to exceed the highest annual rate of basic pay in effect for level V of the Executive Schedule; and

(ii) the cash value of employment benefits comparable to the employment benefits provided by the United States to individuals who are employed by the United States at the same rate of basic pay to perform similar services during the same period of time; and

(B) a percentage fee not to exceed--

(i) in the case of a debtor who is not a family farmer, ten percent; or

(ii) in the case of a debtor who is a family farmer, the sum of--

(I) not to exceed ten percent of the payments made under the plan of such debtor, with respect to payments in an aggregate amount not to exceed $ 450,000; and

(II) three percent of payments made under the plan of such debtor, with respect to payments made after the aggregate amount of payments made under the plan exceeds $ 450,000;

based on such maximum annual compensation and the actual, necessary expenses incurred by such individual as standing trustee.

(2) Such individual shall collect such percentage fee from all payments received by such individual under plans in the cases under chapter 12 or 13 of title 11 for which such individual serves as standing trustee. Such individual shall pay to the United States trustee, and the

United States trustee shall deposit in the United States Trustee System Fund--

(A) any amount by which the actual compensation of such individual exceeds 5 per centum upon all payments received under plans in cases under chapter 12 or 13 of title 11 for which such individual serves as standing trustee; and

(B) any amount by which the percentage for all such cases exceeds--

(i) such individual's actual compensation for such cases, as adjusted under subparagraph (A) of paragraph (1); plus

(ii) the actual, necessary expenses incurred by such individual as standing trustee in such cases.

Subject to the approval of the Attorney General, any or all of the interest earned from the deposit of payments under plans by such individual may be utilized to pay actual, necessary expenses without regard to the percentage limitation contained in subparagraph (d)(1)(B) of this section.

STATEMENT OF THE CASE

The Court of Appeals incorrectly accorded deference to an Agency manual's statutory interpretation in a gross distortion of this Court's decision in *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). The statutory constructions set forth in the Agency manual have previously been subject of conflicting decisions amongst the Courts of Appeal as to whether deference is appropriate under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The statute provides that the fees a Standing Trustee collects from the individual cases he administers are to be applied to the Standing Trustee's compensation and expenses. The statute delegates to the Agency authority to fix a maximum annual compensation for the Standing Trustee, and to set the percentage fee he collects from the cases. The statute also sets an absolute ceiling and a percentage ceiling on Standing Trustee compensation, but delegates no further authority to the Agency to limit Standing Trustee compensation. The Agency manual purports to add a requirement that the Standing Trustee's fees must be applied exclusively to expenses until all expenses are paid, and only if funds are left over may any fees be applied to Standing Trustee compensation.

The opinion of the Court of Appeals turned the *Christensen* holding on its head, granting deference to an Agency prohibition of Standing Trustee action permitted by the statute. Just as in *Christensen*, the Agency view was "exactly backwards": the Agency has no power to appropriate unto itself the authority to create new regulations under the guise of interpreting the statute.

This case brings an important and recurring issue back before the Court: What level of judicial deference, if any, is properly accorded to an Agency ruling not having the force of law. While *Christensen* and *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) make clear that Agency interpretations contained in policy statements, Agency manuals and enforcement guidelines are beyond the *Chevron* pale, the pervasiveness of federal administrative action in giving meaning to Acts of Congress makes this issue one of far greater importance than the dispute presented by this individual case. Further, the Courts of Appeals have already issued conflicting opinions as to

whether the Agency manual at issue is entitled to *Chevron* deference. Accordingly, this Court should grant this petition for writ of certiorari.

A. Statement of Facts

Petitioner Dengel served as Chapter 12 Standing Trustee for the U.S. Bankruptcy Court for the Eastern District of Louisiana from 1987 until his resignation in 1995. Standing Trustees are appointed by the United States Trustee (UST) with the approval of the Attorney General pursuant to the express delegation of 28 USC 586(b), to facilitate the resolution of individual farmers' bankruptcies in designated regions. During the course of Dengel's Standing Trusteeship, the UST issued a "Handbook" for Chapter 12 Standing Trustees which purported to dictate policy for the gamut of Standing Trustee activities. It is undisputed that the Handbook is an Agency manual which does not have the force of law.

The Congressional scheme for compensation of Standing Trustees is set forth at 28 USC 586(e). The Standing Trustee's gross revenue comes from a percentage fee charged on the payments made in the individual cases he administers. Subsection (e)(1) caps this fee at 10%, and delegates to the Attorney General (after consultation with the UST) the determination of a specific percentage fee for the individual Standing Trustee. From this fee, the Standing Trustee is to take his "compensation", which amounts to his net income. Subsection (e)(2)(A) provides that the compensation may not exceed 5% of the payments made in his cases. Also from the fees, the Standing Trustee pays or reimburses the expenses incurred by his Trusteeship, which are in the nature of overhead. Subsections (e)(1)(B) and (e)(2)(B) provide that Standing Trustee expenses must be actual and necessary.

Subsection (e)(2) provides that the Standing Trustee is to collect the percentage fee from the payments in his cases, and then pay over to the UST for the United States Trustee System Fund any amount by which his actual compensation exceeds 5% of the payments made in his cases, and any amount by which the percentage exceeds his actual compensation as fixed by the UST plus his actual, necessary expenses.

The statute contains two absolute limitations on Standing Trustee compensation: the maximum compensation limit and the 5% limit. The statute makes two express delegations to the Agency regarding Standing Trustee compensation: to fix the annual maximum compensation and the percentage fee. No other authority is delegated to the Agency regarding compensation.

The Handbook policy promulgated by the UST interposes the additional requirement that Standing Trustees must utilize their fees to first pay all expenses, and may allocate only those fees remaining after the payment of all expenses to Trustee compensation. This policy is described as the "expense first, funds available" method of calculating compensation.

Upon issuance of the UST Handbook, Dengel pointed out that the expense first, funds available policy appeared to be at odds with the statutory language, and requested that the UST disclose the authority for and basis of the policy. Following several years of non-response, Dengel initiated litigation calculated to obtain a judicial resolution of how he was entitled to apply the fees he collected in the cases in which he served as Standing Trustee to his compensation and expenses. That case was dismissed without a ruling on the

merits, and the issue ultimately came before the Court in the instant action initiated by the UST.

B. Proceedings Below

The proceeding before the Court was initially filed on September 22, 1999 by the United States Trustee against Dengel in U.S. Bankruptcy Court for the Eastern District of Louisiana, seeking a declaratory judgment. Federal question jurisdiction was invoked under 28 USC 1334. After Dengel responded with counterclaims and third party claims, the reference to Bankruptcy Court was withdrawn and the matter lodged in the U.S. District Court for the Eastern District of Louisiana. However, the declaratory judgment demand of the UST was remanded to Bankruptcy Court for a Report and Recommendation pursuant to 28 USC 157(c). On September 20, 2001, U.S. Bankruptcy Judge T. M. Brahney, III entered proposed findings of fact and conclusions of law, finding that the UST Handbook was entitled to *Chevron* deference and proposing judgment in favor of the UST.

On March 5, 2002 U.S. District Judge Stanwood R. Duval, Jr. entered judgment in favor of the U.S. Trustee and against Dengel, adopting the Bankruptcy Court findings and conclusions to the extent consistent with his opinion. That opinion noted that the Handbook was not entitled to *Chevron* deference. Dengel's timely motion for new trial was denied, and the judgment certified for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b). Dengel timely appealed to the U.S. Fifth Circuit Court of Appeals.

The District Court separately entered judgment against Dengel and in favor of Bank One, National Association on Dengel's third party claim on July 22, 2002. This judgment was also certified as final pursuant to Federal Rules of Civil

Procedure 54(b), and also timely appealed by Dengel to the U.S. Fifth Circuit Court of Appeals.

The Court of Appeals consolidated the two appeals, and entered judgment on August 11, 2003 (revised October 1, 2003) adverse to Dengel. With respect to the UST, the Fifth Circuit ruled that the Handbook was not entitled to *Chevron* deference but that *Christensen* provided strong support for the Agency's entitlement to institute any policies not unambiguously prohibited by the statute. As to Bank One, the Fifth Circuit affirmed the dismissal of one of Dengel's claims, but clarified that the dismissal was limited to that claim.

Dengel timely moved for panel rehearing in the Court of Appeal, pointing out that the original opinion completely failed to address two of his four assignments of error and that the original opinion appeared to have read the *Christensen* case backwards. The order denying panel rehearing was entered October 22, 2003. This petition for certiorari timely followed. Dengel seeks review from this Court on the appropriate level of judicial deference to be given the construction of a statute set forth in an Agency manual, suggesting that the entire opinion of the Fifth Circuit should be vacated.

REASONS FOR GRANTING THE WRIT

This Court's jurisdiction to review cases by writ of certiorari serves two basic purposes: To decide questions of importance that are in the public interest to have decided the court of last resort, and to secure uniformity of decision between Courts of Appeal. *Magnum Import Company v. Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923). Both of these purposes exist in this case.

First, this case involves the important question of the appropriate level of judicial deference due to an Agency construction of a statute it administers. The breadth of Agency action in implementing Acts of Congress pervasively affects conduct and commerce throughout the United States. The scope and manner of judicial review of this intersection of the legislative and executive branches of our government is an issue which has come before this Court on multiple occasions. It is an issue of general importance to the public.

Secondly, the Courts of Appeal which have addressed the Agency Handbook at issue have split on whether that Handbook is entitled to *Chevron* deference in its interpretation or implementation of 28 USC 586. Petitioner considered this Court's intervening decisions in *Christensen* and *United States v. Mead* to have illuminated the correct resolution of the split of authority regarding the Handbook. However, petitioner's case points out the need for further illumination, as the Court below has interpreted *Christensen* as an extension rather than a limitation of *Chevron*.

A. The Court of Appeals decision distorts *Christensen* into an expansion of Agency power.

In *Christensen*, this Court restricted the judicial deference extended by *Chevron* to Agency interpretations of ambiguous statutes, holding that such interpretations which lack the force of law do not warrant *Chevron*-style deference. *Christensen* held that the Agency could not "interpret" a regulation to create de facto a new regulation and thereby prohibit the regulated entity from adopting a policy not prohibited by the statute.

The UST Handbook prohibits Standing Trustees from applying their fees to their own compensation until all

expenses have been paid, while 28 USC 586 provides that the fees are to be applied to compensation and to expenses. The statute gives compensation and expenses equal importance, imposing no priority on a Standing Trustee's allocation of his fees.

Judicial review of federal Agency action is one of the fundamental functions of the federal courts. While the individual circumstances for such review may present almost limitless fact situations, the principles applicable to the review need to be clearly and uniformly applied. The decision from which review is sought is one which threatens to distort and mutate the existing guidelines for such review into an unrecognizable re-expansion of *Chevron.*

The decision below converts the conditional respect accorded Agency interpretations by *Skidmore v. Swift & Co.*, 323 U.S. 134, 655 S.Ct. 161, 89 L.Ed.2d 124 (1944) into a judicial seal of approval for all Agency action not explicitly prohibited by statute. While recognizing that the statute at issue was not entitled to *Chevron* deference under *Christensen*, the Fifth Circuit utilized *Chevron* cases and analysis to hopelessly muddle and misstate the deference accorded to Agency interpretations of statutes administered by the Agency.

The Fifth Circuit's analysis begins with the wrong legal standard to be applied to the statutory interpretation. It recites the *Chevron* standard, quoting *Barnhart v. Walton*, 535 U.S. 212, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002): "Hence, we must decide (1) whether the statute unambiguously forbids the Agency's interpretation, and if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible." (*Barnhart* involved an Agency's exercise of statutory rule-making authority.) This

is the appropriate standard for review of an Agency regulation subject to *Chevron* deference, and should not apply to regulations beyond the *Chevron* pale.

The Fifth Circuit's analysis renders *Christensen* unrecognizable. Contrary to the discussion in the Fifth Circuit's opinion, *Christensen* held that the statute at issue did not limit employers from compelling their employees to utilize accrued compensatory time. Also contrary to the opinion's discussion, the Agency opinion letter at issue in *Christensen* did not authorize the employer to require non-exempt employees to use or take their compensatory time, but instead sought to preclude the practice. As a result, the Fifth Circuit misapplies *Christensen* (which held that the federal Agency could not prohibit the employer from action permitted by the statute) as authority for a policy whereby the Agency restricts the Standing Trustee from applying his Trustee fees as permitted by the statute. The Fifth Circuit's conclusion is that the Agency is entitled to institute any policy as long as that policy is not unambiguously prohibited by the statute.

The decision below muddles *Chevron*, *Christensen* and *Skidmore*, citing to *Christensen* while utilizing *Chevron*'s standard of review. It obscures the analysis of the efficacy of Agency interpretations of administered statutes. As precedent, it threatens to make the result of any challenge to an Agency interpretation wholly unpredictable.

B. A conflict exists amongst the Courts of Appeal as to the appropriate level of deference to be accorded to the Agency Handbook.

The UST Handbook at issue has been subject of conflicting decisions among the Courts of Appeal with

respect to the appropriate level of judicial deference. As noted by the Fifth Circuit's opinion, a slightly different issue relating to the calculation of the percentage fee under 28 USC 586(e), and the Handbook resolution of that issue, has received different treatment in different Circuits. In *In Re BDT Farms, Inc.*, 21 F.3d 1019 (10th Cir. 1994), the Court determined that the statute was ambiguous, accorded the Handbook *Chevron* deference, and enforced the Handbook's method of calculation of the percentage fee. In *Pelofsky v. Wallace*, 102 F.3d 350 (8th Cir. 1996), the Court addressed the same issue, also found the statute ambiguous, but declined to accord the Handbook *Chevron* deference. *Pelofsky* found the Handbook interpretation unreasonable, and rejected the UST method of calculation. *Pelofsky* concluded with a footnote urging Supreme Court clarification of the issue.

In the case at bar, dealing with a slightly different aspect of Section 586(e), the Fifth Circuit found the statute ambiguous, explicitly disclaimed *Chevron* deference to the UST Handbook, and then deferred to the Handbook interpretation based upon an analysis actually consisting of *Chevron* deference.

Petitioner respectfully submits that the Fifth Circuit's approach worsens the situation: Rather than following one of the existing authorities, the Fifth Circuit has created a third, internally inconsistent approach to the issue.

Resolution of this conflict cries out for action by this Court, before the muddled analysis of the Fifth Circuit is relied on as authority in any other cases.

C. The result below is wrong.

While acknowledging that the Supreme Court is not a court of error, petitioner cannot resist pointing out that the result below is clearly erroneous. The fact that each judge or panel which has addressed the case below has ruled against petitioner emphasizes the need for this Court's further exposition of the appropriate level of judicial deference to be accorded Agency interpretation.

Christensen and *United States v. Mead* make clear that *Skidmore*'s formulation is the correct standard: such Agency interpretations are entitled to respect only to the extent that they have the inherent "power to persuade." Analyzed under this standard, the Handbook policy cannot stand.[1] In determining that the legislative history from a predecessor Act provided a fig leaf of support for the Handbook policy, the Fifth Circuit opinion was able to avoid addressing the explicit statutory language which renders the claimed purpose of the "expense first" policy meaningless. Without the *Chevron* -style determination that the UST may institute any policy not unambiguously prohibited by the statute, the Court must fully assess the inherent persuasive power of the

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[1] The order of payment makes a difference. The UST calculation allows Dengel a total of $57 in compensation for three years' work 1991-1993, while requiring turnover of approximately $20,000 of "excess" trustee fees Dengel collected to the UST System Fund. Dengel's calculation applies more fees to compensation, although still leaving him with unreimbursed expenses which will not be recouped.

policy. As stated in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986):

> "[A federal] agency may not confer power on itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant the agency power to override Congress. This we are unwilling and unable to do . . . . As we so often admonish, only Congress can rewrite this statute."

CONCLUSION

Dengel requests that this petition for a writ of certiorari be granted to clarify the appropriate level of judicial deference to an Agency construction of the statute it administers, which is an issue of substantial public importance (and will become more so if the holding below is not addressed). Granting the petition will also present the opportunity to resolve the existing conflict between the Courts of Appeals regarding the level of deference to be accorded the UST Handbook.

Alternatively, petitioner requests that this Court grant the writ of certiorari and vacate the decision below, and remand to the Fifth Circuit for reconsideration of the entire case under the existing precedent.

Respectfully submitted:

Kevin O'Bryon
O'Bryon & Schnabel, PLC
1515 Poydras Street, Suite 830
New Orleans, LA 70112
(504) 799-4200
(504) 799-4211 fax
Attorney for Petitioner,
Carl A. Dengel

U.S. Court of Appeals
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CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30574

In the Matter of: CARL A. DENGEL

Debtor

R. MICHAEL BOLEN, United State Trustee, Region 5

Appellee

v.

CARL A. DENGEL

Appellant

Consolidated With
02-30929

CARL A. DENGEL

Appellant

v.

BANK ONE, NATIONAL ASSOCIATION, successor by name change to Bank One, Louisiana, National Association & successor by merger & name change to First National Bank of Commerce

Appellee

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING

Before JOLLY, HIGGINBOTHAM, AND STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

s/Carl E. Stewart
United States Circuit Judge

REHG-2

United States Court of Appeals
Fifth Circuit
FILED
August 11, 2003
Charles R. Fulbruge, III
Clerk

REVISED OCTOBER 1, 2003

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-30574

In the matter of: CARL A. DENGEL,

Debtor.

R MICHAEL BOLEN, United States Trustee, Region 5,

Appellee,

versus

CARL A DENGEL,

Appellant.

Consolidated With

02-30929

CARL A DENGEL,

Appellant,

versus

BANK ONE, NATIONAL ASSOCIATION, successor by name change to Bank One, Louisiana, National Association & successor by merger & name change to First National Bank of Commerce

Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before JOLLY, HIGGINBOTHAM, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In this consolidated civil action, Carl A. Dengel ("Dengel") filed suit against the United States Trustee ("UST") and Bank One for withholding his standing trustee compensation and expenses. In particular, this dispute stems from the UST's interpretation of 28 U.S.C. § 586(e). The district court rendered judgment in favor of the UST and dismissed Dengel's law suit against Bank One. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1987 Dengel was appointed to be a Chapter 12 standing trustee for the U.S. Bankruptcy Court for the Eastern District of Louisiana. Standing trustees are appointed

by the UST with the approval of the Attorney General consistent with 28 U.S.C. § 586 to facilitate the resolution of farmers' bankruptcies in designated regions. Dengel served as a standing trustee until he resigned on September 30, 1995. For performing these services, the standing trustee collects fees. A standing trustee's fees are made up of a percentage amount charged on payments made in individual bankruptcy cases and constitutes gross revenue to the standing trustee. Generally, the statute caps the percentage amount at 10%. From the fees, the standing trustee receives his compensation which is tantamount to his net income. His actual compensation may not exceed 5% of the payments made in bankruptcy cases. Also from the fees, the standing trustee is reimbursed for expenses which are the overhead costs for running the standing trustee's office (i.e, rent, insurance, administrative staff, etc). The standing trustee's fees are governed by 28 U.S.C. § 586(e).

In addition, in 1989, the Executive Office of the U.S. Trustee ("EOUST") created a policy Handbook promulgating a method for calculating the fees. The EOUST Handbook requires that standing trustees first pay all expenses with the remaining fees allocated to compensation. In effect, this policy promulgates the "expense first, funds available" method of calculating fees. The Handbook also allows for unpaid expenses to be carried over from one year to the next, but not unpaid compensation. Beginning in 1989 Dengel submitted annual reports to the UST indicating the fees collected, the allocation of the fees to compensation and expenses, and the remaining surplus or deficit. Despite the Handbook policy, Dengel continued to allocate 5% of fees to expenses and 5% to compensation, rather than employing the "expense first" method of disbursement. Dengel also calculated his loss carryforward of compensation and expenses from year to year resulting in paying his

compensation before all of the year's expenses had been paid in violation of the Handbook policy.

In November 1994, Dengel initiated litigation against the UST contesting the Handbook's "expense first, funds available" method of calculation. In that case, Dengel interpled approximately $5,787 representing a 10% fee from certain pending Chapter 12 cases. These funds were deposited in the court's registry. The district court dismissed that case for lack of subject matter jurisdiction consistent with § 586(b). Dengel did not appeal this decision. Thereafter, Dengel deposited the disputed compensation and expense checks written after November 1994 into an interest bearing account at Bank One that he called "TF12." These checks were derived from Chapter 12 cases under Dengel's administration between November 1994 and October 1995. The total deposited in that account is approximately $26,000. Except for one $14,000 disbursement authorized by the UST, the funds remain in the TF12 account. Ultimately, $5,786.80 remains on deposit in the court's registry and $11,950.63 remains in the TF12 account.

During Dengel's tenure, the Office of Inspector General ("OIG") periodically audited Dengel's annual reports. Both the 1992 and 1994 reports found deficiencies in Dengel's record keeping. In the 1995 audit report, the OIG found that Dengel had not corrected the prior deficiencies and that he was incorrectly carrying over unpaid compensation as well as expenses. Following Dengel's resignation, the OIG ordered a routine close-out audit. His records, however, were not auditable and had to be reconstructed by his successor trustee. This 1997 Audit was focused solely on the incorrect payment of fees. Following the compensation policies in the Handbook, the OIG concluded that Dengel received a net overpayment, and therefore, the funds escrowed in the

court's registry and the TF12 account should be turned over to the UST. Moreover, the OIG concluded that Dengel actually owed the UST an additional $2,843.

In 1998, the UST initiated a declaratory judgment action against Dengel in the bankruptcy court. The suit was then lodged in the district court after Dengel responded with compulsory counterclaims and third party claims against Bank One, the former UST, Region 5 and the Assistant UST, Region 5. In April 2000, The district court referred the action to the bankruptcy court. In July 2000, Bank One filed a Rule 12(b)(6) motion to dismiss. Bank One also moved to interplead seeking to deposit the funds in the trustee account in the registry of the court. In September 2001, the bankruptcy court issued its report and recommendations in which it gave the EOUST Handbook deference in interpreting § 586(e) and concluded that the UST's calculation of Dengel's compensation was correct. In March 2002, The district court reviewed the bankruptcy court's recommendations de novo and rendered judgment in favor of the UST's interpretation giving some deference to the policy in the Handbook and finding that the agency's interpretation has "the power to persuade." In July 2002, the district court granted Bank One's motion to dismiss for the reasons set forth in the bankruptcy court's recommendations and reasons. Dengel now appeals both the judgment in favor of the UST's interpretation and calculation as well as the order granting Bank One's 12(b)(6) motion to dismiss.

DISCUSSION

I. Statutory Interpretation

Dengel argues that the district court erred when it granted judicial deference to the UST's interpretation of 28 U.S.C.

§586[1] as outlined in the EOUST Handbook[2] under Chevron

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[1] The portion of the statute that is the subject of the present dispute reads as follows:

> (e) (1) The Attorney General, after consultation with a United States trustee that has appointed an individual under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11 [11 USCS §§ 1201 et seq. or 1301 et seq.], shall fix--
>
> (A) a maximum annual compensation for such individual consisting of--
>
> (i) an amount not to exceed the highest annual rate of basic pay in effect for level V of the Executive Schedule; and
>
> (ii) the cash value of employment benefits comparable to the employment benefits provided by the United States to individuals who are employed by the United States at the same rate of basic pay to perform similar services during the same period of time; and
>
> (B) a percentage fee not to exceed--
>
> (i) in the case of a debtor who is not a family farmer, ten percent; or
>
> (ii) in the case of a debtor who is a family farmer, the sum of--
>
> (I) not to exceed ten percent of the payments made under the plan of such debtor, with respect to payments in an aggregate amount not to exceed $ 450,000; and
>
> (II) three percent of payments made under the plan of such debtor, with respect to payments made after the aggregate amount

of payments made under the plan exceeds $ 450,000;

based on such maximum annual compensation and the actual, necessary expenses incurred by such individual as standing trustee.

(2) Such individual shall collect such percentage fee from all payments received by such individual under plans in the cases under chapter 12 or 13 of title 11 [11 USCS §§ 1201 et seq. or 1301 et seq.] for which such individual serves as standing trustee. Such individual shall pay to the United States trustee, and the United States trustee shall deposit in the United States Trustee System Fund--

(A) any amount by which the actual compensation of such individual exceeds 5 per centum upon all payments received under plans in cases under chapter 12 or 13 of title 11 [11 USCS §§ 1201 et seq. or 1301 et seq.] for which such individual serves as standing trustee; and

(B) any amount by which the percentage for all such cases exceeds--

(i) such individual's actual compensation for such cases, as adjusted under subparagraph (A) of paragraph (1); plus

(ii) the actual, necessary expenses incurred by such individual as standing trustee in such cases. Subject to the approval of the Attorney General, any or all of the interest earned from the deposit of payments under plans by such individual may be utilized to pay actual, necessary expenses without regard to the percentage limitation contained in subparagraph (d)(1)(B) of this section.

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778 (1984). We conclude that the district court did not err because under Christensen v. Harris County, 120 S.Ct. 1655 (2000), such a handbook may be strongly persuasive. Moreover, we conclude that the UST's interpretation was reasonable and comports with its statutory authority to develop such a method of calculation.

A. Standard of Review

We review the district court's interpretation of § 586 de novo. United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997). To the degree that any factual determinations of the district court are at issue, we review for clear error. In re

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28 U.S.C. §586(e).

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The EOUST Handbook policy interpreting this statute sets forth the appropriate method for calculation of expenses and compensation:

> A trustee must pay all expenses before a trustee can receive compensation, and while unpaid expenses may be carried over to the next year, unpaid compensation cannot be carried forward. Similarly, surplus expense funds which should be paid to the United States Trustee for payment to the Treasury ... in any calendar year may not be carried into a succeeding calendar year, except as otherwise allowed by the Executive Office. The surplus funds must instead be paid promptly to the United States Trustee for payment to the Treasury.

Miller, 290 F.3d 263, 266 n.2 (5th Cir. 2002). The crux of the issues on appeal is whether the district court appropriately gave deference to the Handbook's interpretation of 28 U.S.C. § 586(e). This is a matter of statutory interpretation. "Hence we must decide (1) whether the statute unambiguously forbids the Agency's interpretation, and if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible." Barnhart v. Walton, 122 S. Ct. 1265, 1269 (2002).

B. The Executive Office of the U.S. Trustee has authority under the statute.

Dengel argues that the EOUST Handbook is not entitled to deference for interpreting § 586(e) because § 586 does not confer authority upon the EOUST to create laws or regulations relating to compensation of standing trustees. Dengel refers to the concept of *expressio unius est exclusio alterius* as support for his argument. The district court determined that § 586(e)(1) delegates authority to fix a maximum annual compensation and percentage fee to the Attorney General. To support its conclusion, the district court reviewed the entire statute and determined that the Attorney General has a variety of authority under § 586(c) and (d). The UST asserts that the Attorney General has broad statutory authority to set a fee within the parameters stated in the statute. The UST argues that Dengel's *expressio unius est exclusio alterius* argument is misguided and that the statutory maximum of standing trustee compensation does not place a limit on the Attorney General's, through the EOUST's, authority to determine the manner and order in which compensation and expenses are to be paid. We are persuaded by the UST's argument. Based on the plain language of the statute, Congress has delegated broad authority to the agency to regulate standing trustee compensation and the percentage

fee. Section 586(e)(1) specifically prescribes that "The Attorney General ... shall fix ... a maximum annual compensation ... [and] ... a percentage fee." 28 U.S.C. § 586(e)(1) (emphasis added).

In addition to the language of the statute, *Christensen v. Harris County*, 120 S.Ct. 1655 (2000) supports the Attorney General's authority to institute such a policy. In *Christensen*, the Supreme Court determined that the Fair Labor Standards Act (FLSA) limits the State "from compelling employees to utilize accrued compensatory time." 120 S. Ct. at 1660. In that case, Harris County, Texas gave employees statutorily required accrued compensatory time as payment for overtime above the statutory maximum of 40 hours per week. The County found that employees were accruing more compensatory time than it was going to be able to afford to pay out. Upon request by the County, the Department of Labor issued an opinion letter authorizing it to require non-exempt employees to use or take compensatory time. In response, the County instituted a policy setting a maximum number of compensatory hours that may be accumulated and if the employee does not take steps to reduce accumulated compensatory time, the County may order the employee to use his compensatory time at specific times. Although the employees conceded that "nothing in the FLSA expressly prohibits" Harris County's policy, they complained that according to the canon of *expressio unius est exclusio alterius*, the "express grant of control to employees to use the compensatory time, subject to the limitation regarding undue disruptions of workplace operations, implies that all other methods of spending compensatory time are precluded." Id. at 1660. The Supreme Court found this argument unpersuasive explaining that the fact that the statute provides a "minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it,"

does not mean that the statute does not set forth "the exclusive method by which compensatory time can be used, but [sets] up a safeguard to ensure that an employee will receive timely compensation for working overtime." Id. at 1661. Although the Supreme Court acknowledged that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode," Id. at 1660, "the thing to be done" in the disputed statute is the minimum guarantee. Id. at 1661. In other words, the Supreme Court interpreted the statute in *Christensen* to merely provide the parameters in which the County can administer compensatory time.

Similarly, Dengel expresses the misguided theory that under *expressio unius est exclusio alterius*, the statute limited the Attorney General's authority to fixing a percentage fee and a maximum annual compensation to the exclusion of any other activity. We conclude, however, that "the thing to be done" in the present statute is the 5% maximum allocation of bankruptcy payments to compensation. The statute guarantees a compensation ceiling of 5% but does not prohibit the Attorney General from instituting a method for calculating compensation and expenses, nor does the statute guarantee that trustees will receive the full 5% for compensation. Rather the Attorney General is prohibited from setting an annual maximum compensation exceeding 5% of bankruptcy payments. The Attorney General's "expense first" policy does not change the maximum percentage allowable, it simply sets a calculation method. Thus, the agency's actions do not conflict with the language of the statute.

C. The statute is ambiguous.

To determine whether a statute is ambiguous, we must use the traditional canons of statutory interpretation. This includes looking to the language of the statute itself, the larger statutory context, and the legislative history. See *Walton*, 122 S. Ct. at 1269.

In this case, the statute's silence on the calculation of compensation and expenses indicates its ambiguity. The district court relied on the Tenth and Eighth Circuit's findings in *In re BDT Farms, Inc.*, 21 F.3d 1019, 1023 (10th Cir. 1994) and *Pelofsky v. Wallace*, 102 F.3d 350, 354 (8th Cir. 1996), that § 586(e) is ambiguous albeit in an application other than the one at issue herein, to find that the statute does not preclude nor mandate the expense first method of calculation. Dengel challenges the district court's finding arguing that such an omission, does not reflect ambiguity but rather, the lack of statutory authority for the policy. Dengel asserts that because the statute mentions compensation before it mentions expenses in both subsections (e)(1) and (e)(2), and because the "expense first" policy does not appear in the statute, there is no ambiguity, and therefore, the statute is clear that both compensation and expenses are to be allocated from the trustee fees. The UST argues that the statute is ambiguous because it is silent as to the order in which compensation and expenses are to be paid to standing trustees. The UST asserts that the statute's silence as to how the Attorney General is to fix the trustee fee reflects a gap in the statutory language and therefore the statute is ambiguous. We find the UST's assertions persuasive.

Although the relevant portions of § 586(e) and Chapter 12 refer to both compensation and expenses, there is no mention of the order in which to calculate those expenses. This statutory gap presents a problem of ambiguity. See

Walton, 122 S. Ct. at 1270 ("[S]ilence, after all, normally creates ambiguity. It does not resolve it"); *Chevron*, 104 S. Ct. at 2782 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). Both the Eighth and Tenth Circuits support the conclusion that § 586(e) is ambiguous, albeit for different reasons. "After consideration of the statutory language and context" in *Pelofsky*, the Eighth Circuit concluded "that the meaning of section 586(e) is ambiguous." 102 F.3d at 354. Although the Eighth Circuit was deciding a different issue than that presented in the instant case, the difference is not significant. In the present case, the issue is whether the EOUST Handbook method for calculating compensation is entitled to deference. In *Pelofsky*, the Eighth Circuit was faced with whether the EOUST Handbook method for calculating the percentage fee as required under § 586(e)(1)(B) was entitled to deference. Just as in the present case, the parties disagreed in the method of calculation. The UST argued that section 586(e)(2) governs the calculation of the percentage fee while the debtors argued that § 586(e)(1)(B) was the applicable section and that § 586(e)(2) must be read in conjunction with § 586(e)(1). The Eighth Circuit analyzed each contention within the context of Chapter 12 and found support for each interpretation. Moreover, the Eighth Circuit found no legislative history for clarification of Congressional intent, and therefore, found § 586(e) ambiguous.

The Tenth Circuit, in *In re BDT Farms*, addressed the same issue of the method for calculating the percentage fee required under § 586(e). The Tenth Circuit concluded that § 586(e) is ambiguous because there are divergent judicial interpretations of the statute. Those cases, the Tenth Circuit explained, "add confusion rather than clarity to the

construction of § 586(e)." 21 F.3d at 1023. Like the Eighth Circuit, the Tenth Circuit did not find supportive legislative history to clarify the meaning of the statute. Moreover, the Tenth Circuit found that both interpretations of § 586(e) found support in the larger statutory context.

Although the instant case presents a slightly different issue, determining how the Attorney General, through the EOUST, is to calculate the standing trustee's compensation and expenses is fundamentally similar to the issue determined by the Eighth and Tenth Circuit. Notwithstanding the nuanced difference of the issues, under the same analysis, we conclude that § 586(e) remains ambiguous.

D. The UST Handbook is not entitled to Chevron deference.

After finding that the statute is ambiguous, the second step in the *Chevron* analysis is to determine "whether the agency's answer is based on a permissible construction of the statute." 104 S. Ct. at 2782. We find that it is. In this case, however, the agency's interpretation comes from a published Handbook rather than regulations. The Supreme Court has ruled that "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warrant *Chevron*-style deference." *Christensen*, 120 S. Ct. at 1662. As the EOUST Handbook qualifies as a policy statement, agency manual, or enforcement guideline, this Court cannot give it *Chevron*-style deference. Nonetheless, this Court may find the Handbook persuasive. Id. at 1663 ("Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L.Ed. 124

(1944), but only to the extent that those interpretations have the 'power to persuade.'").

The purpose of the "expense first" policy is to encourage standing trustees to reduce expenses. This purpose comports with the limited legislative history available. Although there is no legislative history precisely on the method of calculation of trustee compensation, we find the House Judiciary Committee's underlying policy for structuring the fee system outlined in § 586 instructive:

> The Attorney General will be able to utilize the private sector to provide personalized efficient service and to keep subordinate employees of the standing trustee off the public payroll. The fee system is designed to encourage the standing trustees to keep costs low at the risk of reduced compensation.

H.R. REP. NO. 95-595, at 107 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6068 and *Collier on Bankruptcy* App. Pt. 4-1176. Although this legislative history references the 1978 Act which was a predecessor to the 1986 Act, it sheds some clarity on the purpose of the fee structure. The Handbook's policy is only persuasive and is not entitled to deference, nevertheless, our conclusion that the Attorney General is not prohibited from instituting the "expense first" policy comports with the plain language of the statute.

As the Supreme Court noted in *Christensen*, "no relevant statutory provision expressly or implicitly prohibits Harris County from pursuing its policy of forcing employees to utilize their compensatory time." 120 S. Ct. at 1663. Similarly, section 586(e) does not appear to either mandate or preclude the "expense first" policy. Notwithstanding our

finding that the statute is ambiguous, the Supreme Court's analysis in *Christensen* also provides strong support for finding that the statute unambiguously does not prohibit the Attorney General, through EOUST, to institute the "expense first" policy, and therefore, the EOUST has not violated § 586(e).

Thus, although the Handbook is not entitled to full *Chevron* deference, the expense first policy is persuasive, particularly in light of the limited available legislative history and the entire context of the statute. We conclude that the UST's policy is not prohibited by § 586(e).

II. Calculation of the Standing Trustee Fees

Dengel argues that the UST's calculation of his compensation fees are arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706 (the "APA"). The APA compels that appellate review of agency action under APA § 706 is for abuse of discretion.

Because the "expense first" policy is not prohibited by the statute, we find that the UST had authority to disallow Dengel from drawing any compensation for the years in dispute. The bankruptcy court explained that the zero compensation orders were correctly calculated because the Handbook specifically disallows any carryover of unpaid compensation from year to year. Because Dengel carried-over his unpaid compensation each year in violation of the Handbook policies, the bankruptcy court accepted the exclusion of carryovers in the UST's calculation and the district court affirmed.

The "expense first" policy reasonably comports with the plain language of the statute as does the calculation which

effectively disallows any compensation for services rendered by Dengel. The statute sets a ceiling for compensation allocated from fees but does not set a floor. The UST contends that its carryover limitation does not deprive the standing trustee from receiving compensation. Rather, the compensation order created by the UST is based on the standing trustee's own budget. The UST contends that it is only because Dengel purposely violated the Handbook's "expense first" and "no carryover of compensation" policies, that the OIG's audit resulted in a zero compensation finding for the years in dispute. We agree. The statute does not guarantee that the standing trustee will receive a full 5% of bankruptcy payments as compensation.

III. Bank One's 12(b)(6) Motion to Dismiss

Before determining whether the district court erred in granting Bank One's 12(b)(6) motion to dismiss, we must determine what was before the district court and the scope of its ruling.

A. Scope of the district court's order

In his third party counterclaim against Bank One, Dengel complained that Bank One: "1) improperly disclosed privileged information, 2) froze the account for four years, 3) paid minimum interest, 4) did not respond or seek a resolution of the problem, 5) reneged on a loan commitment, and 6) damaged Carl Dengel's creditworthiness." In sum, his counterclaim amounts to seeking damages for Bank One's failure to turn over the funds in the TF12 account to Dengel and for breaching the loan commitment. He attached as exhibits various letters between the parties, including an unsigned loan commitment letter. The letter states that the commitment shall be null and void if Dengel's and his wife's

signatures representing acceptance are not received by August 25, 1995 and if the commitment is not funded by September 23, 1995. The attachments do not include Dengel's acceptance of the loan commitment nor do they include confirmation that the loan has been funded.

Bank One filed a 12(b)(6) motion to dismiss Dengel's "lender liability claim ... [f]or the reasons set forth in the attached memorandum." In the attached memorandum supporting the 12(b)(6) motion, Bank One requested that:

> If the Court accepts the recommendation of the bankruptcy court, then Bank One's interpleader claim will be moot, and Dengel's claim against Bank One for the turnover of the funds should be dismissed with prejudice.

Also in the attached memorandum, Bank One requested that: "[B]ased on Dengel's third party complaint and the attachments thereto, Dengel's lender liability claim against Bank One should be dismissed for failure to state a claim upon which relief may be granted." Although Bank One asked that both claims be dismissed, Bank One exclusively asked for a 12(b)(6) dismissal on Dengel's lender liability claim. On July 22, 2002 the district court entered judgment on Bank One's motion: "Considering the foregoing order and finding there is no just cause for delay as provided in Fed.R.Civ.P. 54(b), IT IS ORDERED that judgment be entered against Carl A. Dengel and in favor of Bank One dismissing Carl A. Dengel's third-party claim with each party to bear its/his own costs." The referenced "foregoing order" reads: "Considering the reasons set forth in this Court's adopting the Report and Recommendation of the Bankruptcy Court, IT IS ORDERED that Bank One's Motion to Dismiss is GRANTED."

Regarding his claim for damages resulting in Bank One's refusal to turn over the funds in the TF12 account, the district court only granted dismissal on Dengel's lender liability claim and not on his other claims. On its face, Bank One only moved to dismiss Dengel's lender liability claim. Viewing the motion in the light most favorable to the nonmoving party, Bank One did not request dismissal of all third-party claims against it.[3] Fairly read, we cannot construe the language in Bank One's supporting memo as part of its 12(b)(6) motion to dismiss Dengel's lender liability claim. Instead, Bank One merely made a vague assertion that its interpleading motion should be moot and that Dengel's other third-party claims should be dismissed with prejudice. As Bank One moved to dismiss only Dengel's lender liability claim, we conclude that the district court's order relates to only the lender liability claim. The district court never rendered final judgment in Bank One's motion to interplead the funds into the court's registry.

B. Standard of Review

We review the district court's dismissal of a claim under the Federal Rules of Civil Procedure 12(b)(6) de novo. *Vulcan Materials Co. v. Tehuacana*, 238 F.3d 382, 387 (5th Cir. 2001). "The complaint must be liberally construed in favor of the plaintiff, and all the facts pleaded in the complaint must be taken as true" to determine whether the

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The district court has not ruled on Bank One's motion to interplead the funds. The third party claims against the former UST, Region 5 and the Assistant UST, Region 5 also remain outstanding.

plaintiff has any valid claim for relief. *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999). The dismissal will be upheld only if "it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief." *U.S. ex rel Thompson v. Columbia HCA/Healthcare Corp.*, 125 F.3d 899, 901 (5th Cir. 1997).

In this case, however, the district court's order must be construed as a grant of summary judgment because the district court did not exclude Dengel's affidavit which was outside of the submitted pleadings. See *Burns v. Harris County Bail Bond Bd*, 139 F.3d 513, 517 (5th Cir. 1998). ("When matters outside the pleadings are presented to and not excluded by the district court, the district court must convert a motion to dismiss into a motion for summary judgment."). We, therefore, construe Bank One's motion to dismiss as a summary judgment motion and apply the applicable standard of review. See *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 896 (5th Cir. 2002). Even if the district court erred by failing to review Bank One's motion to dismiss as a motion for summary judgment, this error is reversible only if Dengel had no notice or opportunity to refute Bank One' allegations in the motion to dismiss. See *Herron v Herron*, 255 F.2d 589, 594 (5th Cir. 1958) (reversing a grant of a motion to dismiss without converting it to a motion for summary judgment because the Appellant did not have notice or opportunity to examine a material fact to the underlying claim). "[E]rror in notice is harmless if the nonmoving party admits that he has no additional evidence anyway or if ... the appellate court evaluates all of the nonmoving party's additional evidence and finds no genuine issue of material fact." *Powell v. United States*, 849 F.2d 1576, 1582 (5th Cir. 1988). By submitting his extra-pleading affidavit, we conclude that Dengel was put on notice that the district court could have converted Bank One's motion to

dismiss into a motion for summary judgment. Moreover, we find that Dengel presented no genuine issues of material fact to overcome summary judgment. Thus, the district court committed no reversible error.

As an initial matter, Dengel's affidavit is inappropriate summary judgment evidence. Thus, we do not consider it here. Rule 56(e) requires statements in affidavits to be based on personal knowledge and not based on information and belief. *Richardson v. Oldham*, 12 F.3d 1373, 1378 (5th Cir. 1994) (instructing that statements "based on information and belief ... [are] struck as not based on personal knowledge and therefore fail[] the requirements of Fed.R.Civ.P. 56(e)"). In his affidavit,
Dengel specifically noted that "on information and belief, and to the best of affiant's recollection, the original letter was timely signed by affiant and Deborah Walworth [his wife]..." Because Dengel's affidavit is expressly based merely on information and belief, it is struck as not based on personal knowledge and therefore fails the requirements of summary judgment evidence.

Dengel's pleadings present no factual dispute to overcome summary judgment nor do his pleadings state a claim upon which relief may be granted. "[W]e consult the applicable law to ascertain the material factual issues." *F.D.I.C. v. Firemen's Ins. Co. of Newark, NJ*, 109 F.3d 1084, 1087 (5th Cir. 1997). In this case, we look to Louisiana law. See Id. ("We look to state law for rules governing contract interpretation."). Because Dengel did not plead that he and his wife signed the credit agreement and because the alleged credit agreement attached to the third party claim is not signed by Dengel and his wife as required by La. R.S. 6:1122, Dengel may not maintain an action for the alleged breach under Louisiana Law. Under Louisiana law, "[a]

debtor shall not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." La. R.S. 6:1122 (2003).

Dengel also urges that even though the copy of the commitment letter was not signed, there is other evidence attached to his third party counterclaim that establishes that there was a written agreement signed by the creditor and the debtor. In particular, Dengel offers that Bank One scheduled a loan closing which "very strongly implies that a valid, binding and written loan commitment signed by both parties existed between the Bank and Dengel." We disagree. Under Louisiana law, "a writing cannot qualify as a credit agreement if parol evidence must be received in order to establish that status." *Fleming Irr. Inc. v. Pioneer Bank & Trust Co.*, 661 So. 2d 1035 (La. App. 2nd Cir. 1995). Regardless of whether Dengel's evidence that there was a loan commitment absent a signed commitment letter constitutes parole evidence, under Louisiana law, "the written agreement must be perfect and complete within itself." Id. In this case, Dengel has not produced a complete agreement under Louisiana law subject to a genuine issue of material dispute required to overcome summary judgment or on which to state a claim for relief.

CONCLUSION

Under the traditional cannons of statutory interpretation, 28 U.S.C. § 586(e) does not prohibit the Attorney General from instituting an "expense first" method of calculating expenses and compensation. The EOUST Handbook's policy that compensation cannot be carried forward from year to year comports with the plain language of the statute. The district court did not err in so ruling and therefore, we

AFFIRM the district court's judgment.

Moreover, we construe the district court's order granting Bank One's motion to dismiss Dengel's lender liability claim as granting summary judgment to Bank One and AFFIRM that order.

AFFIRMED.

DATE OF ENTRY
MAR 05 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JANICE CHENIER TAYLOR	CIVIL ACTION
VERSUS	NO. 00-0783
CARL A. DENGEL	SECTION "K"(1)

ORDER AND REASONS

On April 18, 2000, this Court ruled on a Motion to Withdraw Reference of Bankruptcy Case filed by Carl Dengel ("Dengel") (Doc. 4). In that order the Court found as follows:

> The United States Trustee ("UST") filed the instant adversary complaint citing subject matter jurisdiction pursuant to 28 U.S.C. §1334. UST apparently brought the proceeding before the bankruptcy court as a non-core proceeding pursuant to 28 U.S.C. §157(c). In the suit, the UST sought to have funds allegedly collected by Dengel from Chapter 12 debtors over and above the statutorily determined compensation orders of the UST, returned to those debtors or to the successor trustee appointed upon the resignation of Dengel as Chapter 12 trustee. Dengel filed a compulsory third party counterclaim personally against the U.S. Trustee Janice Taylor and the Assistant U.S. Trustee Diana Rachal alleging tortious acts beyond the scope of their

employment.

The U.S. attorney designated the third party defendants as operating within the scope of their employment and substituted the U.S. Government as defendant. As such, the exclusive remedy as to this counterclaim lies within the Federal Tort Claims Act over which the district court has exclusive jurisdiction.

Dengel filed the instant motion seeking the withdrawal of reference of the bankruptcy case, yet he opines in the body of his pleading that he "agrees that in any case the District Court has jurisdiction over the Federal Tort Claims Act complaint but does not necessarily agree that the Bankruptcy Court is without jurisdiction." The U.S. attorney does not oppose the withdrawal of the reference under 11 U.S.C. § 157(a). The UST does not dispute or deny that jurisdiction lies in the district court to determine any and all issues presented in the main demand and counterclaims; however, the UST suggests that this Court refer the original declaratory judgement action of the UST to render proposed finding of facts and conclusions of law **with respect to the original demand of the UST.**

The Court finds the UST's solution the most judicially economical. The bankruptcy court has abundant knowledge of the facts concerning these fees obtained during the protracted history of the bankruptcy proceedings in that court. The Court believes that a report and recommendation with respect to those issues for its *de novo* review would be the best method by which to adjudicate that portion of this matter.

Thus, the Court granted the Motion to Withdraw Reference; however, the main demand of the UST was remanded to bankruptcy court for a report and recommendation pursuant to 28 U.S.C. §157(c).

The Report and Recommendation was issued on September 20, 2001. A "Memorandum on Declaratory Issues" was filed on December 7, 2001. A response thereto was filed on December 14, 2001. A hearing on the matter was conducted on January 30, 2002. Pursuant to 28 U.S.C. § 157(c)(1), the Court has considered the objections lodged using a *de novo* standard of review.

The Court has reviewed the Proposed Findings of Fact and Conclusions of Law as well as the transcript of the testimony taken at the hearing and exhibit introduced in connection thereto. Although there are various claims and counterclaims in this matter, the mandate to the Bankruptcy Court was to render Proposed Findings of Fact and Conclusions of Law with respect to the original Declaratory Judgment filed by the United States Trustee ("UST"). The issue for the bankruptcy court to determine was whether funds taken by Dengel from certain Chapter 12 cases as Trustee compensation were excessive. To make that determination, required the bankruptcy court, among other things, to determine the effect of a policy statement of the Executive Office of the UST (EOUST) in two Handbooks for standing Chapter 12 Trustees, dated Dec. 1989 and June 1992 ("Handbooks"), which were in effect during Dengel's services as Chapter 12 Trustee.

Bankruptcy Report and Recommendation

The bankruptcy court found that Dengel was aware of the policy contained in the Handbooks which provided that (1) Chapter 12 Trustees must pay all approved actual and necessary expenses before receiving compensation; and (2) unpaid expenses can be carried over from one year to the next, but unpaid compensation cannot. That court found that Dengel knew of that policy, but continued to use the policy

in effect prior to the one set forth in the Handbooks. Dengel took as his Trustee's fee the statutory maximum of 10% and allotted 5% to expenses and 5% to compensation. According to the Handbook, compensation cannot be carried forward to the next year, but expenses may. Therefore, it was to the advantage of Dengel not to recover all expenses during a fiscal year, as he could perhaps recoup incurred expenses the next fiscal year.

After hearing testimony, the bankruptcy court found that all of the funds in escrow in the Court's registry and in another account labeled the TR 12 account in BankOne should be turned over to the UST and that Dengel owed the sum of $2843 to the UST. The court accepted EOUST's interpretation of 11 U.S.C § 586(e) which is the statute relating to the compensation of Chapter 12 Standing Trustees and which was interpreted in the Handbooks as requiring expenses to be paid prior to compensation. In doing so, the Court relied on the deference standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984). It also relied on *Pelofsky v. Wallace*, 102 F.3d 350, 354 (8th Cir. 1996) and *In re BDT Farms, Inc.*, 21 F.3d 1019, 1023 (10th Cir. 1994) for the proposition that § 586(e) was ambiguous.

Objections Raised by Dengel

Dengel contends that he is entitled to retain $17,737.43 of disputed funds. He agrees that the central issue relates to the "expense first, funds available" policy of the Handbooks. Dengel argues that the requirement that Standing Trustee fees be exclusively devoted to the payment of Standing Trustee Expenses, until all expenses are paid, before any compensation is received is without basis in the statute. Dengel contends that the policy set forth in the Handbook is

not entitled to *Chevron* deference as a result of the decision in *United States v. Mead*, 121 S. Ct. 2164 (2001). Dengel contends that *Mead* makes it clear that the policy must stand or fall on its own inherent reasonableness.

Analysis

The Court finds that indeed the "strong deference" standard set forth in *Chevron* does not apply. *Mead* held that "generally... Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Mead*, 121 S. Ct. at 2172. *Mead* also stated, "Interpretations contained in policy statements, agency manuals, and enforcement guidelines" were beyond the *Chevron* pale. *Id.*

The *Mead* court did point out that the lack of a formal administrative procedure is not sacrosanct as *Chevron* deference has been applied when there is no such formality. *Mead* at 2173 n. 13, citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810 (1995). In *NationsBank* the Court held that the Comptroller of the Currency is charged with enforcement of banking laws to an extent that warrants the rule of deference with respect to the meaning of the applicable laws.

The statute at issue gives the Attorney General, *inter alia*, (1) supervisory authority over the United States Trustees (28 U.S.C. § 586(c)); (2) authority to prescribe the qualifications for membership to serve (28 U.S.C. § 586(d)); and (3) authority to fix a maximum annual compensation and a percentage fee (28 U.S.C. § 586(e))(1). With respect to compensation under § 586(e)(1), the statute provides that a

Standing Trustee's fee including expenses may not exceed 10% from payments received. Actual compensation may not exceed 5%.

Under the policy set forth in the Handbooks, if the expenses of a Standing Trustee equal 10% of payments received (maximum amount allowed), he must take the expenses and receive no actual compensation. As noted that expenses can be carried forward and compensation may not. This policy encourages the Standing Trustee to reduce expenses so that he may receive his compensation.

Dengel has argued that the statute is not ambiguous and the statute does not allow the "expense first" policy as set forth in the Handbooks. In *Pelofsky* and *BDT Farms*, the Eighth Circuit and the Tenth Circuit found § 586(e) ambiguous albeit in another application other than the one at issue herein. *Pelofsky* did not employ *Chevron* deference to a provision of the EOUST Handbook as it would have resulted in a violation of the statute. *BDT Farms* did apply *Chevron* deference to a provision of the EOUST Handbook as it relates to compensation.

The Court has carefully reviewed § 586(e) it does not appear to either allow or preclude the "expenses first" policy. The statute does give considerable authority to the Attorney General to supervise and administer the Standing Trustee program as well as granting the Attorney General rule making authority. In an abundance of caution, this Court will apply the standard announced in *Mead* which harkens to the previous standard announced in *Skidmore v. Swift & Co.*, 65 S. Ct. 161 (1944). In *Mead* the Supreme Court interpreted *Skidmore*, as holding that "an agency's interpretation may merit some deference whatever its form ...given the value of uniformity in its administrative and judicial understandings

of what a national law requires." *Mead*, 121 S. Ct. at 2175. As *Skidmore* was interpreted in *Christensen v. Harris County*, 120 1655, 1663 (2000), an agency handbook such as the Handbooks issued herein is "'entitled to respect,'...but only to the extent that those interpretations have the power to persuade." *See Henrikson v. Guzik*, 249 F.3d 395, 398 (5th Cir. 2001).

Considering the ambiguity of the statute, the regulatory powers of the Attorney General with respect to compensation and the rationale of the "expense first" policy which encourages Standing Trustees to minimize expenses, the Court does give some deference to the policy as set forth in the Handbook and finds that the application of the Handbook regulations at issue is appropriate and reasonable. Thus, the Bankruptcy Court's application of that standard was correct, albeit based on a different standard.

Thus, to the extent consistent with this opinion,

IT IS ORDERED that the Court adopts the Proposed Findings of Fact and Conclusions of Law adopted by the Bankruptcy Court and judgment shall be rendered in favor of the United States Trustee and against Carl A. Dengel ordering that the funds remaining in the Registry of the Court and in the TR12 account at BankOne, be declared the property of the United States Trustee.

New Orleans, Louisiana, this 5th day of March, 2002.

s/_____

STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JANICE CHENIER TAYLOR	CIVIL ACTION
VERSUS	NO. 00-0783
CARL A. DENGEL	SECTION "K"(1)

JUDGMENT

Considering the foregoing Order and Reasons, and findings no just cause for delay as provided for in Fed. R. Civ. Pro. 54(b),

IT IS ORDERED, ADJUDGED AND DECREED that judgment shall be rendered in favor of the United States Trustee and against Carl A. Dengel and that the funds remaining in the Registry of the Court and in the TR12 account at BankOne, is declared the property of the United States Trustee.

New Orleans, Louisiana this 5th day of March, 2002.

s/_____
STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT COURT JUDGE

DATE OF ENTRY
MAR 05 2002

MINUTE ENTRY
DUVAL, J.
July 18, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JANICE CHENIER TAYLOR, U.S. Trustee, Region 5 — CIVIL ACTION

VERSUS — NO. 00-783

CARL A. DENGEL, ET AL. — SECTION "K"(1)

Considering the reasons set forth in this Court's adopting the Report and Recommendation of the Bankruptcy Court,

IT IS ORDERED that Bank One's Motion to Dismiss is **GRANTED**.

s/Stanwood R. Duval, Jr.

DATE OF ENTRY
JUL 23 2002

____ Fee _____
____ Process _____
_x_ Dktd _____
_✓_ CtRmDep _____
Doc No _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JANICE CHENIER TAYLOR, U.S. Trustee, Region 5 — CIVIL ACTION

VERSUS — NO. 00-783

CARL A. DENGEL, ET AL. — SECTION "K"(1)

JUDGMENT

Considering the foregoing order and finding there is no just cause fo reason for delay as provided in Fed. R. Civ. Pro. 54(b),

IT IS ORDERED that judgment be entered against Carl A. Dengel and in favor of BankOne dismissing Carl A. Dengel's third-party claim with each party to bear its/his own costs.

New Orleans, Louisiana, this 22nd day of July, 2002.

s/_____
STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT COURT JUDGE

DATE OF ENTRY
JUL 23 2002

____ Fee _____
____ Process _____
__x__ Dktd _____
__✓__ CtRmDep _____
Doc No _____

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

JANICE CHENIER TAYLOR, UNITED STATES TRUSTEE, REGION V	MISC. NUMBER
PLAINTIFF	99-102 SECTION A
V.	
CARL A. DENGEL	
DEFENDANT	

CARL A. DENGEL

THIRD-PARTY PLAINTIFF

V.

DIANA L. RACHAL AND
JANICE CHENIER TAYLOR

THIRD-PARTY DEFENDANTS

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on the Complaint for Declaratory Judgment filed by the Plaintiff, Janice Taylor, the United States Trustee for Region V ("UST"). The

Defendant, Carl Dengel, filed a counterclaim against Taylor and Diana Rachal, Assistant UST, under the Federal Tort Claims Act. He then filed a Motion to Withdraw Reference with the United States District Court ostensibly citing this Court's lack of jurisdiction to hear the tort claim. The District Court, Judge Stanwood R. Duval, Jr., ultimately withdrew the reference, but remanded the original Complaint to this Court for findings under 28 U.S.C. §157(c).

The issue for this Court to consider is whether funds taken by Dengel from certain Chapter 12 cases as Trustee compensation were in excess of that authorized by statute. Trial was held on the Complaint at which time the Court heard the statements of counsel, the testimony of witnesses and received documentary evidence. Upon consideration of the statements made, the evidence presented, the memoranda submitted, the record in the case and the applicable law, and at the direction of the District Court, the Court enters the following Proposed Findings of Fact and Conclusions of Law.

PROPOSED FINDINGS OF FACT

1. Dengel served as Chapter 12 Standing Trustee for the Eastern District of Louisiana from January 1, 1990 until September 30, 1995. He was appointed under 28 U.S.C. §586(b).

2. The Executive Office of the UST ("EOUST") promulgated two Handbooks for Standing Chapter 12 Trustees, dated December 1989 and June 1992 ("Handbooks"), which were in effect during Dengel's term as Chapter 12 Trustee. These Handbooks basically interpret the multipart test set out in 28 U.S.C. §586(e) that is used to determine the maximum amount of a collected trustee's fee

that could be retained by standing trustees in Chapter 12 and 13 cases. Both Handbooks set forth the following policies: (1) that Chapter 12 Trustees must pay all approved actual and necessary expenses before receiving compensation and (2) that unpaid expenses can be carried over from one year to the next, but unpaid compensation cannot.

3. Dengel stated at the trial that he had been aware of the UST's policy regarding compensation and expense priority since February of 1990. He also stated that he disagreed with the position taken in that policy. The evidence shows that, even after he knew of the UST policy, Dengel continued to use the procedure which had been used for Chapter 12 Trustee compensation prior to the implementation of the UST program, that is, he took as h is Trustee's fee from cases 10% of case disbursements and allotted 5% to his expenses and 5% to his compensation.

4. The UST's operation of their policy was illustrated at trial by the testimony of Linda Aguilar, a UST analyst. She began the procedure by ascertaining the trustee's actual and necessary expenses, as set forth in the trustee's budget. Then she ascertained the trustee's maximum compensation, as set forth in the Percentage Fee and Compensation Orders prepared for the trustees. This was done pursuant to §586(e)(1)(A). Then, applying §586(e)(2)(A), she calculated compensation in excess of 5% of the debtor payments received by the trustee. According to §586(e)(2)(B), she then determined the percentage fee amount available after the trustee paid approved expenses. Taking the lowest amount of the three amounts representing the Percentage Fee and Compensation Order, the compensation over 5% of the payments received and the fee amount available after expenses, she added this figure to the approved expenses to arrive at the total maximum amount that a trustee was

authorized to retain for compensation and expenses.

5. Dengel was issued Percentage Fee and Compensation Orders from the UST for the years 1990-1994. He also submitted budgets to the UST for payment of expenses, which were approved by the UST either as submitted or after amendment. The above-described procedure was followed to determine the maximum compensation and expenses Dengel was authorized to retain from his cases.

6. Dengel also submitted Annual Reports, as required by the EOUST, for calendar years 1990-1994, which reports included information regarding receipts and disbursements, but not checks or other records of Dengel's. Apparently, Dengel also began contacting the UST for Region V regarding his position that their policy on expenses first and then available funds to compensation was erroneous. There is in evidence correspondence from as early as March of 1993 sent by employees of the UST and by Dengel regarding his compensation calculations, his expenses, his operating deficits and other related concerns.

7. In late 1994, this dispute between Dengel and the UST concerning the correctness of the compensation he was taking came to a pinnacle. On November 10, 1994, Dengel filed an adversary proceeding in this Court entitled *In re Ozzie Travis Givens, Debtor and Carl A. Dengel, Trustee v. Victoria E. Young, United States Trustee*, Adv. No. 94-1245. In that case, Dengel interpled the sum of approximately $5,787.00, representing a 10% fee from certain pending Chapter 12 cases. These funds were deposited in the Court's registry. That case (as refiled on April 21, 1995) was dismissed by the Court for lack of jurisdiction over the setting of compensation and expenses of a Standing Trustee appointed under Section 586(b). Dengel did not appeal this

decision.

8. In letters from Dengel to the UST, dated June 22, 1995, July 9, 1995 and September 7, 1995, he stated that he placed disputed compensation and expense checks written after November 1994 into an interest-bearing account at the First National Bank of Commerce in New Orleans (now Bank One). These checks were derived from Chapter 12 cases under Dengel's administration between November 1994 and October 1995. That account, designated "Carl A. Dengel TF12" ("TF12"), was opened on June 21, 1995.

9. The total deposited in that account between June 21, 1995 and January 23, 2001 was approximately $26,000.00. Except for one $14,000.00 disbursement to Dengel in December of 1995, which was authorized by the UST, the funds remain in the TF12 account.

10. The total principal amount remaining on deposit in the Court's registry is $5,786.80 and the total amount remaining on deposit in the TF12 account is $11,950.63. The funds in both accounts continue to accrue interest.

11. During Dengel's tenure as Chapter 12 Trustee, the Office of the Inspector General ("OIG") periodically audited Dengel's annual reports. The results of those audits were reports containing findings and recommendations copies of which were provided to Dengel. Both the 1992 and 1994 Audit Reports found deficiencies in Dengel's record keeping, especially with respect to his expense account. In the 1995 Audit Report, the OIG found that Dengel had not corrected prior deficiencies and that there were other problems, including Dengel's misstatement of operating deficits (he was carrying over unpaid compensation, as well as expenses), accounting inconsistencies and lack of reports to

debtors.

12. Following Dengel's resignation as Chapter 12 Trustee in September of 1995, the OIG ordered a routine "close-out" audit of Dengel's records. His records, however, were apparently not auditable and had to be reconstructed by the successor trustee. Because there had been three prior audits and by agreement with the EOUST, this audit was focused solely on incorrect payment of fees. This is referred to as the 1997 Audit Report.

13. As a result of this audit, and using the compensation policies outlined in the Handbooks, the OIG concluded as follows: (a) Dengel transferred $92,383.00 in fees from individual debtor cases into his accounts; (b) due to his disagreements over compensation calculation with the UST, Dengel deposited a total of $31,974.00 into escrow accounts (the TR12 account and the Court's registry); (c) subtracting the $14,000.00 authorized by the UST in payment of Dengel from the TR12 account, the total fees he actually received amount to $74,409.00; (d) for the period reviewed, the years 1991 through 1995, Dengel was entitled to compensation in the amount of $23,406.00 and an authorized budget of $57,398.00, for a total due of $80,804.00; (e) since he only received $74,409.00, he was entitled to $6,395.00 more in compensation.

14. The OIG report also concluded that Dengel had, in fact, received a net overpayment based on two facts. First, in April of 1997, this Court had ordered Dengel to pay the estate in the case of *Arabie Farms*, No. 88-10998, $7,032.00 in overpaid Chapter 12 trustee fees. Second, there was a payment to Dengel in the *Emile Poche* case, No. 87-02103, of $9,238.00 that Dengel accounted fro as an attorney's fee, but for which there was no record of any court approval for

such a fee. Dengel's assertion that the fee was really a trustee's fee incorrectly recorded was supported only by a letter from an officer at First National Bank in Donaldsonville, Louisiana stating, without any supporting documentation, that he was sending Dengel a check for $9,238.00 for his "trustee fee".

15. Subsequent to the 1997 Audit Report, Dengel repaid the excessive fee in *Arabie Farms* by taking an equivalent reduction in his fee for serving as the Chapter 7 trustee in that case. With the adjustment for the *Poche* case, using the figures attained by OIG, the funds escrowed in the Court registry and in the TR12 account properly should be turned over to the UST and Dengel would actually owe the UST $2,843.00.

16. Peter Losavio, a tax and estate attorney and CPA, was the expert offered by Dengel to refute the policy position taken by the UST and also their determinations, as well as those of OIG, regarding the maximum compensation and expenses Dengel was authorized to retain under 28 U.S.C. §586(e). He interpreted the provisions of §586(e)(2)(B) to mandate allowing a 5% of the gross collected trustee fees to go to trustee compensation regardless of expenses. Indeed, his computations regarding Dengel's fees simply take the gross fees of 10% as determined by the OIG and applying 5% to compensation and 5% to approved expenses. The Fee and Compensation Orders of the UST were taken into account, but only as an alternative calculation.

17. Losavio's calculations also adjusted the OIG determinations for 1991 to include the *Poche* fee of $9,238.00 as a trustee fee. He also included and accounted for total operating deficits carried over by Dengel from 1987. Dengel testified that the reason he continued as Standing

Chapter 12 Trustee as long as he did despite getting "zero comp" orders from the UST, was so that he could recoup these operating deficits. Using this different approach and including the *Poche* fee and the operating deficits, Losavio opined that Dengel is entitled to all of the funds in the escrowed accounts and owes no money to the UST, since the escrowed funds to not even cover the deficits he accumulated.

PROPOSED CONCLUSIONS OF LAW

1. As aforementioned, the issue for this Court to address is whether the funds taken by Dengel from certain Chapter 12 cases as Standing Trustee compensation were in excess of what was authorized by law. The statute to be considered in this determination is 28 U.S.C. §586(e) and the parties clearly have divergent interpretations of that statute.

2. Pursuant to 11 U.S.C. §326(b), it it not in this Court's jurisdiction to actually set the compensation and expense reimbursement for a standing Chapter 12 trustee appointed under §586(b). That is to be determined by the United States Attorney General, through the UST. However, the Court's jurisdiction does exist to consider the proper interpretation of §586(e).[1]

3. Section 586(e) provides, in pertinent part, as follows:

(1) The Attorney General, after consultation with a

---

[1] There is judicial jurisdiction to determine if a challenged action by an agency is contrary to statute. See *Aerolinas Argentinas v. United States*, 77 F.3d 1564 (Fed. Cir. 1996).

United States trustee . . . shall fix - - -

(A) maximum annual compensation for each individual . . . and

(B) a percentage fee not to exceed - - -

* * * * *

(ii) in the case of a debtor who is a family farmer, the sum of - - -

(I) not to exceed ten percent of payments made under the plan of such debtor. . .;

* * * * *

based on such maximum annual compensation and the actual, necessary expenses incurred by such individual as standing trustee.

(2) Such individual shall collect such percentage from all payments received by such individual under plans in the cases under Chapter 12 . . . for which such individual serves as standing trustee. Such individual shall pay to the United States trustee, and the United States trustee shall deposit to the United States Trustee System Fund - -

(A) any amount by which the actual compensation of such individual exceeds 5 per centum upon all payments received under plans . . . and

(B) any amount by which the percentage for all such cases exceeds - - -

(i) such individual's actual compensation for such cases, as adjusted under subparagraph (A) of paragraph (1); plus

(ii) the actual, necessary expenses incurred by such individual as standing trustee in such cases.

4. Section 586(e) is hardly a shining example of clarity. There is, unfortunately, no Fifth Circuit case addressing the statute or its interpretation. Consequently, the Court must turn to other courts and finds that it must agree with the Eighth Circuit in *Pelofsky v. Wallace*, 102 F.3d 350, 354 (8th Cir. 1996) and the Tenth Circuit in *In re BDT Farms, Inc.*, 21 F.3d 1019, 1023 (10th Cir. 1994) wherein those courts found that §586(e) is ambiguous with respect to how a trustee's fee is determined (those cases dealt with issues within the context of §586(e) different from those in question here).

5. When a statute is found to be ambiguous, the court must determine whether the relevant agency's construction of that statute is permissible and not "arbitrary, capricious or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-4, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Court is aware that, under *Chevron*, courts "'defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering.'" *Pelofsky*, 102 F.3d 353, quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) (Emphasis added.) Nonetheless such deference "'does not permit abdication of judicial responsibility to determine whether the challenged [action] is contrary to statute, . . . devoid of administrative authority[,]' or is otherwise unreasonable." *Id.* , quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1574 (Fed. Cir. 1996).

6. The court in *BDT Farms* deferred to the interpretation of the relevant part of §586(e) that was contained in the Handbooks. The court in *Pelofsky* did not. This Court must examine the language of §586(e) relevant here. As the court noted in *Pelofsky*, although §586(e)(2) may be specifically

relevant, courts must read that subsection in connection with §586(e)(1). *Pelofsky*, 102 F.3d at 354.

7. Dengel's expert, Losavio, urged an interpretation of §586(e)(2) that assured a trustee of a fee of at least 5% of the payments made, regardless of their expenses, based essentially on the fact that §586(e)(2) refers to compensation first, that is, in (e)(2)(A) and not (B). In other words, because §586(e)(2)(A) refers to a trustee returning amounts collected by which compensation exceeds 5% and §586(e)(2)(B)(ii) references returning amounts collected which exceed compensation plus expenses, Losavio concludes that a trustee receiving at least 5% of payments made for his compensation is essential to the statute. He also concluded that it was essential, from an accounting standpoint, to not have the compensation "formula" dependent on a variable like expenses. At trial, Losavio put forth no case law on statutory construction to support his position, other than mentioning that this is how tax statutes are usually interpreted.

8. The Court does not find this approach to interpreting §586(e)(2) meritorious. First, the Court is unaware of any supporting precedent. Second, trustee expenses are a variable that must be taken into account, no matter how difficult the process. Third, since §586(e)(2) must be interpreted in conjunction with §586(e)(1), the Court notes that §586(e)(1)(B)(ii) specifically provides that the trustee's percentage fee of ten percent (for aggregate plan payments of $450,000.00 or under) is based on a maximum annual compensation and the trustee's actual, necessary expenses. This indicates to the Court that compensation and expenses share equal importance in the statutory scheme §586(e) provides for a trustee's retained compensation.

9. On the other hand, after carefully reviewing the statute, the Court cannot find that the UST's policy on trustee compensation, as outlined in the Handbooks, is unreasonable. The Handbook policy requiring expenses to be paid first and then compensation from available funds is consistent with the provisions of §586(e)(1) and (2). It is not arbitrary and capricious. Consequently, the Court must defer under *Chevron* to the EOUST's interpretation of a statute they are charged with administering.

10. Upon accepting the EOUST's interpretation of §586(e), the Court then has examined the conclusions drawn and calculations obtained by the OIG in its final audit of Dengel's records. The Court finds these consistent with the UST policy and §586(e). The Court will, therefore, accept the conclusions and calculations of the OIG, and not those of Losavio. The Court notes that it finds no support for including Dengel's operating deficits from prior to his appointment under §586(b) as carryovers. This period was before the UST program was in place and has no place in these calculations. Moreover, the Handbooks specifically disallow any carryover of unpaid compensation from year to year and such carryovers were included in Losavio's computations.

11. In sum, the Court finds that all of the funds in escrow in the Court's registry and in the TR12 account should be turned over to the UST and that Dengel owes to the UST the sum of $2,843.00. An appropriate Proposed Judgment will be entered.

New Orleans, Louisiana, September 20, 2001.

s/_____

THOMAS M. BRAHNEY, III
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

JANICE CHENIER TAYLOR, UNITED STATES TRUSTEE, REGION V	MISC. NUMBER
PLAINTIFF	99-102 SECTION A
V.	
CARL A. DENGEL	
DEFENDANT	

CARL A. DENGEL

THIRD-PARTY PLAINTIFF

V.

DIANA L. RACHAL AND
JANICE CHENIER TAYLOR

THIRD-PARTY DEFENDANTS

PROPOSED JUDGMENT

For the reasons assigned in the foregoing Proposed Findings of Fact and Conclusions of Law entered herein by the Court this date,

IT IS ORDERED, ADJUDGED AND DECREED that, on the Complaint for Declaratory Judgment filed by Janice Taylor, Region V United States Trustee ("UST"), judgment be, and it is hereby, entered **IN FAVOR OF THE UST**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the funds remaining in the registry of the Court and in the TR12 account at Bank One be, and they are hereby, **DECLARED PROPERTY OF THE UST.**

New Orleans, Louisiana, September 20, 2001.

s/_____
THOMAS M. BRAHNEY, III
UNITED STATES BANKRUPTCY JUDGE